Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1800

RONALD BRYCE LAUGHMAN,
THOMAS E. NIEHAUS,
MITCHELL DALE ANGLIN,
DANIEL N. DONNELLY,
WALDAMAR EBERT,
LARRY KIM MICHAEL COFFEY,
JAMES EDWARD MARCHANT,
KENNETH DAVID JESTER,
RICHARD STEVE CARR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1. Certiorari should be granted in this case because where the search of the vessel on the navigable water, but inside the continental United States was not permissible without some showing of a recent border crossing by that vessel, and where the officers actually boarding the vessel, or their superior, did not possess probable cause to conduct a warrantless search at the time the vessel was boarded.	6
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In The

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No. ———

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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Ronald Bryce Laughman, Thomas E. Niehaus, Mitchell Dale Anglin, Daniel N. Donnelly, Waldamar Ebert, Larry Kim Michael Coffey, James Edward Marchant, Kenneth David Jester, and Richard Steve Carr, by their attorneys, pray that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for the Fourth Circuit entered in the above case on April 11, 1980.

OPINIONS BELOW

No written opinion regarding the issues in the case was filed or published by the United States District Court for the District of South Carolina. The Opinion of the Fourth Circuit Court of Appeals, which affirmed the Judgment of the District Court, is at pages 2a-21a of this Appendix and has not been officially reported to date.

JURISDICTIONAL STATEMENT

The date of the Judgment of the Court of Appeals for the Fourth Circuit and the date of its entry is April 11, 1980 (App. 3a).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (i).

QUESTIONS PRESENTED FOR REVIEW

Whether officers boarding a vessel in the navigable waters of the United States did so with sufficient probable cause, communicated to them, at the time they actually boarded the vessel.

CONSTITUTIONAL PROVISIONS

Amendment Four.

The right of the people to be secure in their persons, houses, papers, and affects, against unreasonable searches and seizures, shall not be violated, ...

STATEMENT OF THE CASE

On August 9, 1977, the Petitioners were indicted in the United States District Court for the District of South Carolina, Charleston Division, in a two count indictment charging them in count one with conspiracy to possess marijuana with intent to distribute in violation of the provisions of Title 21, United States Code, Section 846 and in Count two with possession with intent to distribute approximately 4,300 pounds of marijuana in violation of Title 18, United States Code, Section 2. All of the Petitioners were named in both counts of that indictment.

A timely motion to suppress items of evidence seized by the investigating agents, including items seized from the sailing vessel, was filed on behalf of all the Petitioners. The District Court heard evidence in support of the warrantless search of the vessel and ruled that the boarding officers or their supervisors possessed sufficient probable cause to board the vessel, (App. 25a-26a) despite the fact that the boarding officers contended that their authority rested upon Title 19 United States Code Section 1581 (a). After a trial to the Court, without a jury, all nine Petitioners were convicted.

This case had its beginning in the early morning hours of July 26, 1977, when customs patrol officer, David A. McDonald, commenced to follow a pickup truck near Charleston, South Carolina. In the course of his surveillance officer McDonald observed the individual operating this pickup truck meet with three other individuals driving a brown pickup truck, which was towing a small outboard boat. After this meeting, officer McDonald caused other agents to be called in on the surveillance, which eventually led to a motel near Charleston where a third pickup truck was observed being driven by one of the same individuals who had occupied the second truck. At the motel, other

officers obesrved five of the Petitioners, Donnelly, Jester, Ebert, Laughman, and Carr, working on or about the boat attached to the second pickup truck. Additionally, the Petitioners Donnelly, Jester, Anglin, Laughman, Carr, and Coffey were observed entering and departing the same room at the motel.

Late in the evening on July 26, 1977, the second pickup truck departed the motel and went to a campground that bordered the intercoastal waterway, when a fourth truck was observed exiting the same campground. This fourth truck proceeded out of the campground, parked and its occupant appeared to be attempting to communicate over a C-B or other type radio.

Two Customs Patrol Officers, McDonald and Keith Puig, established an observation position near the campground and approximately 200 yards from the boat ramp in the campgrounds that led to the Intercoastal Waterway. The weather was poor as it had been raining and it was very dark. (App. 29a-30a). Commencing at midnight, Officer McDonald began to observe activity in the Intercoastal Waterway: he observed a motorized rubber raft containing what appeared to be cargo, however, he was unable to determine the nature of that cargo. (App. 29a-30a) Approximately one hour later, Officer McDonald observed a sailing vessel, without lights, in the Intercoastal Waterway. (App. 30a) and additional motorized rafts were seen in the vicinity of the sailboat (App. 31a). Officer McDonald did observe the rubber rafts head toward the area of the boat ramp but was never able to distinguish the nature of the cargo.

It is at this point that Officer McDonald informed other Government agents on a boat in the Intercoastal Waterway to pick him up and then board the sailing vessel. (App. 32a) Officer McDonald apparently presumed that all of

the vehicles in the campground had left; but when he observed the lights of what appeared to be a remaining vehicle he advised the agents on board the government boat to board the sailing vessel without him. (App. 32a) It was then that Officer McDonald went to the boat ramp, discovered two of the Petitioners, one truck, two rubber rafts, and marijuana residue on the ramp and on one of the rafts. (App. 32a-33a)

On board the government vessel there were three agents, Custom Patrol Officers Garcia, Daspith, and Bell. (App. 34a) These agents were in communications with Officer McDonald via radio (App. 36a). However, the radio communications were apparently very bad. (App. 35a)

Officer Garcia did not observe any illegal activity on or about the vessel prior to boarding (App. 35a-36a). Moreover, it was apparent to Officer Garcia that the sailboat was lived on by someone as it contained clothing and other gear. (App. 37a) Officer Bell, one of the officers on board the government boat, recalls only two communications that were received from Officer McDonald: The first, to come to the shore so that he, McDonald and Puig could board, and secondly, a message to disregard the first message and go and board the vessel without him. (App. 38a) Officer Bell, like Officer Garcia did not receive any communication from Officer McDonald about residue at the Buckhall Boat Ramp prior to boarding the sailboat (App. 38a).

When the pickup trucks, except truck number two, departed the campground they were followed by other agents; however, they were not stopped and searched until such time as the vessel had been boarded and the boarding agents had discovered marijuana residue (App. 40a-42a). Thus, the discovery of residue on board the vessel formed the bases of the probable cause needed to stop the trucks

on the highway, obtained the search warrant for one truck at a local motel and obtained the search warrant to search two rooms at local motels.

As was noted above, three of the four trucks departed the campgrounds including the fourth truck, which was yellow in color. That truck was stopped on the highway after the search of the vessel and searched without benefit of warrant (App. 41a-42a). That truck was operated by the Petitioner, Laughman, and was searched by Agent Caldwell of the South Carolina Law Enforcement Division who testified that upon opening the rear of the truck he observed a rubber raft and residue. (App. 41a-42a) This testimony was shown to be in obvious error as other agents testified that two rubber rafts were recovered at the boat landing (App. 33a) and two were tied to the rear of the vessel (App. 37a), and since only four rafts were recovered totally, Agent Caldwell could not have observed a raft in the rear of the truck operated by Petitioner Laughman.

REASONS FOR GRANTING CERTIORARI

1. **CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE WHERE THE SEARCH OF THE VESSEL ON THE NAVIGABLE WATER, BUT INSIDE THE CONTINENTAL UNITED STATES WAS NOT PERMISSIBLE WITHOUT SOME SHOWING OF A RECENT BORDER CROSSING BY THAT VESSEL AND WHERE THE OFFICERS ACTUALLY BOARDING THE VESSEL, OR THEIR SUPERIOR, DID NOT POSSESS PROBABLE CAUSE TO CONDUCT A WARRANTLESS SEARCH AT THE TIME THE VESSEL WAS BOARDED.**

ARGUMENT

When the boarding party of officers Garcia, Daspith and Bell first boarded the vessel they announced that their actions were being taken pursuant to the provisions of Title 19, Section 1581 (a) of the United States Code. While Section 1581 (a) purports to give to the Customs officers broad authority to board any vessel within the United States waters and examine the manifest or other papers and search the vessel it is submitted that Section 1581 (a) must be subject to the restrictions imposed by the Fourth Amendment to the United States Constitution.

The language of Section 1581 (a) parallels that of Title 8, Section 1357 (a) (3) which provides for a search by Immigration and Naturalization Service officers of vessels and automobiles to prevent the entry of illegal aliens into the United States. This Court in the case of *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973) has restricted the authority of the Immigration and Naturalization Service under Section 1357 (a) (3) of Title 8 to conduct warrantless searches without the existence of probable cause. This restriction, concisely stated, requires the existence of probable cause unless it can be clearly established that there has been a recent border crossing.

It is suggested that the same reasoning should apply to the authority granted in Title 19, Section 1581 (a) of the United States Code to officers of the United States Customs Service. Perhaps it was just such reasoning that persuaded the attorney for the United States to advance to existence of probable cause to justify the search of the vessel. Likewise, regardless of the reason, both the District Court and the Court of Appeals for the Fourth Circuit adopted the position that the search was based upon probable cause. (App. 8a).

From the outset it should be clear that the Petitioners are not challenging the proposition relied upon by Judge Hoffman, in his opinion below, that "The law seems to be clear that so long as the officer who orders an arrest or search has knowledge of facts establishing probable cause, it is not necessary for the officers actually making the arrest or conducting the search to be personally aware of those facts." (App. 9a)

But the problem presented by these facts goes one step beyond this proposition. Judge Hoffman, in his opinion, alluded to the problems but sidestepped the issue by finding the existence of a fact is just not supported by the record. Judge Hoffman's opinion recites the observations of officer McDonald and the other officers from the early morning hours of July 26, until the boarding of the vessel in the early morning hours of July 27. (App. 10a) However, the difficulty is presented in the assumption made in footnote (4). Wherein, he at least alludes to the proposition that officer McDonald possessed the information he discovered at the boat ramp at the time the vessel was boarded. It is this critical fact that is not supported by the record.

The observations of officer McDonald and the other officers prior to McDonald's discovery of residue at the boat ramp, while admittedly suspicious, could not have constituted probable cause. This Court has generally held that probable cause under the Fourth Amendment exists ". . . where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *Berger* v. *New York,* 388 U.S. 41 (1967) at page —; see also *Husty* v. *United States,* 282 U.S. 694 (1931). While *Berger,* supra dealt

with the probable cause necessary to obtain a warrant (in that case arrest) this Court has uniformly held that the requirements of probable cause to search without a warrant is ". . . at least as much . . ." as would be required to support an application for a search warrant. *Recznik* v. *Lorain,* 393 U.S. 166 (1968) at p. 169. Likewise, it is a well established principle that each search must be viewed independently and must stand or fall on its own facts. *Cooper* v. *California,* 386 U.S. 58 (1967).

It is clear from the record in this case that officer McDonald gave the order to board the vessel before leaving his initial observation post. As a result he could not have discovered the residue on the boat ramp, could not have discovered the two rubber rafts, together with their residue, and the pickup truck until after he had given the order to board. Admittedly, officer McDonald testified that he radioed his findings at the boat ramp to the boarding officers; however, it is equally clear that the boarding party did not receive that information prior to boarding, since officer Bell testified that he received only two broadcasts prior to boarding, (App. 38a-39a), one instructing him to pick up officer McDonald so that he could be with them when the vessel was boarded and the other instructing him to go board the vessel without him. (App. 31a-33a). Officer McDonald testified that the vessel had not been boarded at the time he discovered residue at the boat-ramp, however, the reliability of that testimony must be questioned in view of the fact that officer Bell, who was in the boarding party, testified that it was so dark and visibility so poor that on one occasion their boat passed the sailing vessel inadvertently. (App. 37a-38a).

In determining the existence of probable cause to conduct a search, whether with or without a warrant the time for making that determination is the time the warrant is

sought or the time the search is made. *United States* v. *Rahn,* 511 F. 2nd 290 (10th Cir. 1975); *Iverson* v. *State of North Dakota,* 480 F. 2nd 414 (8th Cir. 1973). Such a proposition is only logical since to do otherwise would be to create a situation where the validity of a search would be determined, at least in part by the results of the search.

A close examination of the information possessed by the agents at the time Officer McDonald ordered the boarding reveals that while they may have possessed sufficient information to raise their suspicions they did not have sufficient facts to establish probable cause. The officers had observed six young men in the Charleston area in possession of four pickup trucks and one small outboard boat. They also observed these same men go to a campground near the Intercoastal Waterway and one of them attempting to use a C-B radio. All of this activity took place during the daylight or early evening hours.

Later, during the early A.M. hours of July 27, 1977, Officer McDonald heard, then saw a rubber raft in the Intercoastal Waterway. Approximately one to two hours later he first observed the sailing vessel in the Intercoastal. He observed rafts proceeding between the vessel and the campgrounds carrying an unknown cargo. At this point in time Officer McDonald had nothing to connect the activity of the six young men and four trucks observed earlier with what he was observing in the Intercoastal Waterway, not until that is, he went to the boatramp and discovered: 1) one of the pickup trucks he had observed earlier that day, 2) two of the individuals he had seen earlier, 3) two rubber rafts, 4) marijuana residue at the ramp and in one raft.

While the Petitioners realize that Officer McDonald insists that he found the residue prior to the vessel being

boarded his position is just not supported by the record. Judge Hoffman, in his opinion reasoned:

> At trial, McDonald insisted that he had discovered the marijuana residue prior to the boarding of the ABRAXIS. If his discovery of the marijuana precede the boarding of the sailing vessel, then there is no question but that McDonald possessed sufficient knowledge to establish probable cause. Appellants concede this; nevertheless, they maintain that the boarding took place before the discovery of the marijuana residue. (Appellants' contention is bolstered by the fact that, at trial, neither Bell nor Garcia were able to confirm having heard McDonald's announcement of his discovery on the radio.) Appellants further contend that without the discovery of the marijuana residue by McDonald, the facts are insufficient to establish probable cause; therefore, argue appellants, the boarding took place without probable cause.
>
> Whether McDonald discovered the marijuana residue before or after the board of the ABRAXIS took place is a factual question which we are unable to resolve on the basis of the record before us. However, we see no necessity for resolving this question, inasmuch as we find that McDonald had sufficient probable cause to stop and board the ABRAXIS prior to his discovery of the marijuana residue. (App. 11a)

Probable cause to search the vessel can not be found without the discovery of the residue at the boatramp, and this record, while not disclosing the exact point in time, i.e., before or after boarding, that the residue was found strongly suggests that it was found after boarding. This matter should be remanded to the District Court for a specific finding by that Court as to the point in time that the residue was found, and then for a determination of how that affects the issue of probable cause to search the vessel.

2. WHERE A LAW ENFORCEMENT OFFICER IN A CRIMINAL TRIAL PRESENTS FALSE EVIDENCE OF A MATERIAL FACT IN ORDER TO OBTAIN A CONVICTION AND WHERE THE ATTORNEY FOR THE GOVERNMENT ALLOWS THIS FALSE EVIDENCE TO BE PRESENTED WITHOUT CORRECTING IT, A DEFENDANT CONVICTED UPON SUCH EVIDENCE HAS BEEN DENIED DUE PROCESS OF LAW IN CONTRAVENTION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

South Carolina Law Enforcement Division Agent Marshall Dean Powell testified that he was present when the yellow Chevrolet truck was stopped. He then went to the back of the vehicle. He testified that both he and Special Agent Caldwell saw a rubber raft of the Zodiac type in the rear of that yellow camper. (App. 33a-34a). That camper was being driven by the Appellant, Ronald B. Laughman.

Defendant's Exhibit 4 is the inventory of the back of the yellow Chevrolet camper. An examination of that exhibit and the testimony of Agent Luther Cook conclusively establishes that there was no rubber raft in the back of that camper. (App. 43a).

An examination of the rubber rafts, considering their size, and the testimony of Agent Powell leaves no other conclusion except that Agent Powell and Agent Caldwell intentionally lied about finding the rubber raft in the vehicle being driven by the Appellant Laughman. No reasonable mind could conclude that Agents Caldwell and Powell made a mistake. The interior of the yellow truck being driven by the Appellant Laughman was approxi-

mately five feet wide by and between ten feet long at the top and six feet to eight feet long on the bed of the truck. (App. 43a-44a). The rubber rafts seized are twelve feet to fourteen feet long and six to seven feet wide. (App. 43a, 44a). They are medium grey in color. An examination of the Zodiacs which were introduced in evidence demonstrates this fact. The Zodiac bag, however, is small and robin's egg blue in color. This bag was also introduced into evidence. A comparison of the two shows that no "mistake" could have been made as the trial judge found. (App. 27a-28a). The agent deliberately presented false evidence. This evidence went uncorrected until discovered by counsel for the defendants.

The use of this perjured testimony violated the Appellant Laughman's rights in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States and therefore, requires a reversal of his convictions. *Giglio* v. *United States,* 450 U.S. 150 (1972); *Miller* v. *Pate,* 386 U.S. 1 (1967); *Brady* v. *Maryland,* 373 U.S. 83 (1963); *Alcorta* v. *Texas,* 355 U.S. 28 (1957); *Napue* v. *Illinois,* 360 U.S. 264 (1959); *United States* v. *Lusterino,* 450 F.2d 572 (2nd, 1971); *Imbler* v. *Craven,* 424 F.2d 621 (9th, 1969); *United States* v. *Sanfilippo,* 564 F.2d 176 (5th, 1977); *United States* v. *Barham,* 595 F.2d 231 (5th, 1979).

This purported finding of a rubber raft was the evidence used to tie the Appellant Laughman to the alleged conspiracy and aiding and abetting charge. Without the rubber raft, the only evidence against the Appellant Laughman, the driver of the yellow camper, to tie him to the alleged conspiracy and aiding and abetting of possession with intent to distribute are the facts that he stayed at the same motel as some of the other Appellants and that

he was stopped driving on the same road as some of the other Appellants.

The Appellant Laughman's conviction, based upon perjured testimony, must be reversed.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

JUDGMENT AND COMMITMENT ORDER

The Judgment and commitment order on the Petitioners was not available to Counsel. Below is a summary of the sentence of each Petitioner. The date of sentence was May 12, 1978.

Ronald Bryce Laughman — Custody of the Attorney General for a period of forty months followed special parole of three years.

Thomas E. Niehaus — Custody of the Attorney General for a period of forty months followed by special parole of three years.

Mitchell Dale Anglin — Custody of the Attorney General for a period of forty-two months followed by special parole of three years.

Daniel N. Donnelly — Custody of the Attorney General for a period of forty months followed by special parole of three years.

Waldamar G. Ebert — Custody of the Attorney General for a period of forty months followed by special parole of three years.

Larry Kim Michael Coffey — Custody of the Attorney General for a period of forty months followed by special parole of three years.

James Edward Marchant — Custody of the Attorney General for a period of forty months followed by special parole of three years.

Kenneth David Jester – Custody of the Attorney General for a period of forty months followed by special parole of three years.

Richard Steve Carr – Custody of the Attorney General for a period of three years followed by a special parole of three years.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5153

UNITED STATES OF AMERICA,

Appellee,

v.

RONALD BRYCE LAUGHMAN, THOMAS E. NIEHAUS, MITCHELL DALE ANGLIN, DANIEL N. DONNELLY, WALDAMAR EBERT, LARRY KIM MICHAEL COFFEY, JAMES EDWARD MARCHANT, KENNETH DAVID JESTER, and RICHARD STEVE CARR,

Appellants.

Appeal from the United States District Court for the District of South Carolina, at Charleston.
Solomon Blatt, Jr., District Judge.

Argued: December 6, 1979 Decided: April 11, 1980

Before BUTZNER and PHILLIPS, Circuit Judges, and HOFFMAN*, District Judge.

Henry E. Sheldon; William C. Oldfield (James L. Cobb, W. Robert Lotz, Jr. on brief) for Appellants; Lionel S. Lofton, Assistant U. S. Attorney (Thomas E. Lydon, U.S. Attorney on brief) for Appellee.

HOFFMAN, District Judge:

The appellants were charged under an indictment alleging one count of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. § 846, and one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841 (a) (1). The matter went to trial before the court, without a jury, on February 21 and 22, 1978. Each of the appellants wos convicted of both counts.

The pertinent facts are as follows: On the morning of July 26, 1977, Customs Patrol Officer McDonald received information about suspicious activities at the Buck Hall Campground located north of Charleston, South Carolina. Acting on this information, McDonald took his car and

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* The Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

proceeded north on Highway 17 towards Buck Hall Campground. Along the way he encountered two pickup truck-campers bearing out-of-state license plates, one an orange Chevy and the other a brown Ford pulling a boat.[1] By 10:45 the same morning, surveillance was established at the Ramada Inn, North Charleston, where both campers had parked. A blue Chevy camper bearing Ohio license plates, apparently being driven by the same individual who had been driving the brown Ford, was also observed.

During the day various people, including appellants Donnelly and Jester, were seen working on the boat attached to the brown Ford. Appellants Ebert, Laughman, Anglin and Carr were observed coming and checking with the men at the boat.

At approximately 6:30 p.m. the brown Ford with the boat departed the Ramada Inn and proceeded north on Highway 17 towards Buck Hall. At approximately 7:15 p.m. the brown Ford entered the Buck Hall Campground. (Buck Hall Campground is about three-quarters of a mile off Highway 17. The campground is adjacent to the intracoastal waterway). There is a concrete boat ramp at the Buck Hall landing, and the brown Ford was observed backing the boat into the water, although it was not actually launched.

At approximately 7:55 p.m. a yellow pickup truck-camper with Kentucky tags came out of the campground and turned north on Highway 17. South Carolina State Law Enforcement Division (SLED) agents reported that the yellow pickup went to the area of McClellanville (located on the intracoastal waterway about seven miles north of Buck Hall) where it parked on a hill and appeared

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[1] At trial McDonald described these vehicles as the type typically used to haul large quantities of marijuana

to use a C.B. radio. After about 30 minutes, the yellow camper returned to the campground.

McDonald, at approximately 10:15 p.m., entered the campground and set up an observation post on private property located about 200 yards from the boat ramp. He received word that the orange and blue campers had left the Ramada Inn, heading towards Buck Hall. From about 10:30 until midnight, the brown, orange and blue campers moved back and forth between Buck Hall and an area located about four miles further south on the intracoastal waterway. Eventually, the campers assembled at Buck Hall Campground.

During the evening of July 26th and the morning of July 27th, McDonald maintained radio contact with various other Customs, SLED and Drug Enforcement Administration (DEA) agents in the area. The evening was very dark and rainy. At about midnight McDonald and other officers heard an outboard motor. They were able to discern a rather large Zodiac type rubber boat moving south along the waterway. The boat contained two individuals and a "mound of indistinguishable cargo." The boat proceeded south until it was out of sight.

About an hour later, the officers observed a sailing vessel of the "Columbia type" moving south on the waterway. The sailboat was moving "very quickly" and without running lights. Two Zodiac rubber boats (the same types as observed earlier) were tied alongside the sailboat.

The sailboat proceeded south past McDonald and appeared to drop anchor. There was a lot of activity on and around the sailboat. According to McDonald a barge or tug boat appeared in the waterway to the south prompting the sailboat and the rubber boats to turn and head north. McDonald observed three of the rubber boats, all containing large mounds of indistinguishable cargo.

McDonald then observed the rubber boats going ashore in the area of the boat ramp at Buck Hall. Shortly thereafter, the rubber boats reappeared, no longer containing any cargo. At about the same time the engines of several trucks started up and the vehicles departed the campground. McDonald advised the other units that the campers were leaving and to follow closely.

When the campers departed, McDonald ordered two officers, who were heading north on the waterway in a DEA boat, to continue north and board the sailboat. McDonald had intended that the DEA boat pick up himself and another officer prior to boarding the sailboat; however, when he observed that one camper was still at the boat ramp, he decided that he should investigate the camper. Accordingly, he advised the DEA boat to proceed without him.

McDonald went to the boat ramp, where he found the brown camper along with two individuals, Ebert and Anglin. Ebert was in the cab of the camper and Anglin was next to the boat ramp. Two of the rubber boats had been pulled up on the boat ramp and McDonald observed a large amount of what appeared to be marijuana residue in the boats and on the ramp. Upon discovering the marijuana residue, McDonald notified the other units by radio that the boats did, in fact, contain marijuana. McDonald testified that he advised the officers in the DEA boat of his discovery prior to their boarding of the sailboat (although the officers on the boat did not recall receiving such a message prior to boarding).

McDonald arrested Ebert and Anglin. Found in Ebert's possession at the time of his arrest was identification for appellant Laughman. Marijuana residue was subsequently discovered in the brown camper.

Acting on McDonald's instructions, Customs Patrol Officers Bell and Garcia boarded the sailing vessel ABRAXIS in the intracoastal waterway. Marijuana residue was found on board, along with appellants Niehaus, Marchant and Coffey. Two of the large rubber boats were tied alongside the vessel.

The campers that had departed the campground (between 2:30 and 3:00 a.m. on the 27th) were followed by units positioned near the entrance to the campground. The blue Chevy camper was followed south on Highway 17 to the parking lot of the Knights Inn, which is located across from the Ramada Inn in North Charleston. Appellant Donnelly was observed parking the blue camper. Later, pursuant to a valid search warrant, the blue camper was entered and found to contain in excess of 3000 pounds of marijuana.

The orange and yellow campers departed Buck Hall Campground together shortly after the blue camper. The two campers proceeded south on Highway 17 followed by Customs Patrol Officers and SLED agents. After hearing McDonald announce that he had discovered marijuana residue, the officers stopped both campers. The orange pickup contained the appellants Carr and Jester, as well as over 1100 pounds of marijuana.

The yellow camper was driven by appellant Laughman. At trial, SLED Agent Caldwell testified that the rear of the yellow camper contained one of the rubber boats, partially deflated, along with some marijuana residue. Later in the trial it was established that what Agent Caldwell had observed in the rear of the yellow camper was not a boat, but rather was one or more covers for the Zodiac type rubber boats. Agent Caldwell also testified that although he found marijuana residue, he took no samples; at trial no marijuana samples were introduced from the yellow camper.

Appellants challenge the district court's actions on several grounds. First, they argue that the warrantless search of the sailing vessel ABRAXIS was unlawful and that the court erred in admitting evidence obtained from the vessel. Next, they challenge the admissibility of evidence obtained by a warrantless search of luggage found inside the brown pickup truck-camper. The appellants also contend that the court erred in refusing to direct a verdict of acquittal at the close of the government's case because the evidence was insufficient to support convictions on either of the charges alleged in the indictment. Finally, appellant Laughman contends that perjured testimony served as the basis for his conviction.

I.

The appellants maintain that the boarding of the sailing vessel ABRAXIS in the intracoastal waterway was unlawful in that the boarding officers lacked sufficient probable cause to believe that the vessel contained contraband or had been engaged in the illegal transportation of contraband.[2] Officers have probable cause to search whenever

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[2] Customs officials may conduct routine warrantless border searches at international borders or their "functional equivalent" regardless of whether there exists probable cause to believe that a customs violation has occurred. *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 272 (1972). However, there cannot be an *Almeida-Sanchez* border search without some degree of probability that the vessel has crossed a border; i. e., the officials must possess some articulable facts tending to show that the vessel has recently crossed an international border. *United States* v. *Whitmire,* 595 F.2d 1303, 1307 (5th Cir. 1979); *United States* v. *Johnson,* 588 F.2d 147, 154 (5th Cir. 1979); *United States* v. *Williams,* 544 F.2d 807, 811 (5th Cir. 1977). The sailing vessel ABRAXIS was first sighted on the intracoastal waterway. There was nothing which would indicate that the vessel had recently crossed an international border. For that reason, the boarding of the ABRAXIS cannot be justified as a routine border search conducted at the "functional equivalent" of a border. In realization of this the government seeks to justify the

"the facts and circumstances within their knowledge, and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that [contraband] . . . was being transported in the [vehicle] . . . which they stopped and searched." *Carroll* v. *United States,* 267 U.S. 132, 162 (1925); *see Brinegar* v. *United States,* 338 U.S. 160, 171 (1949); *see also Adams* v. *Williams,* 407 U.S. 143 (1972) (probable cause to make an arrest).

As a preliminary task, we must decided whether the knowledge of Officer McDonald, who was in charge of the investigation and who ordered the boarding, can be imputed to the boarding officers, Bell and Garcia. The law seems to be clear that so long as the officer who orders an arrest or search has knowledge of facts establishing probable cause, it is not necessary for the officers actually making the arrest or conducting the search to be personally aware of those facts.[3] Therefore, if the knowledge possessed by

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warrantless boarding and subsequent search of the vessel on the grounds that there existed probable cause to believe that the vessel was involved in illegal activity and that the mobility of the sailing vessel made the procurement of a warrant impracticable.

[3]

> When a superior officer orders another officer to make an arrest, it is proper to consider the superior's knowledge in determining whether there was probable cause. Likewise, when a group of agents in close communication with one another determines that it is proper to arrest an individual, the knowledge of the group that made the decision may be considered in determining probable cause, not just the knowledge of the individual officer who physically effected the arrest.

United States v. *Woods,* 544 F.2d 242, 260 (6th Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977), 430 U.S. 969 (1977), and 431 U.S. 954 (1977); *see also United States* v. *Loundmannz,* 472 F.2d 1376 (D.C. Cir. 1972), *cert. denied,* 410 U.S. 957 (1973); *United States* v. *Trabucco,* 424 F.2d 1311 (5th Cir.) *cert. denied,* 399 U.S. 918 (197); *United States* v. *Pitt,* 382 F.2d 322, 324 (4th Cir. 1967) ("Probable cause . . . can rest upon the *collective* knowledge of the police, rather than solely on that of the officer who actually makes the arrest.")

Officer McDonald was sufficient to establish probable cause, it is inconsequential that Bell and Garcia may not have been totally aware of that knowledge. Accordingly, we should examine the situation as it appeared to Officer McDonald.

A number of out-of-state camper vehicles (of the type typically used to haul large quantities of marijuana) had been observed in and around the Buck Hall Campground from early on the morning of July 26th until the early morning of July 27th. From about 10:30 p.m. until midnight on July 26th, there was activity between the Buck Hall Campground and an area located about four miles south along the intracoastal waterway. Shortly after midnight, McDonald observed a rubber boat containing two people and "a mound of indistinguishable cargo" heading south on the intracoastal waterway. At approximately 1:15 a.m. on the morning of the 27th, McDonald saw the ABRAXIS proceeding south in the intracoastal waterway. The vessel had no running lights, even though it was a dark and rainy night, and there were two rubber boats tied alongside. McDonald observed a lot of activity in and around the ABRAXIS. He observed three rubber boats, each carrying a large mound of indistinguishable cargo, moving from the ABRAXIS to the Buck Hall boat ramp, where they deposited their cargoes. Shortly thereafter, the campers began departing from the area of the boat ramp.[4]

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[4] At this point McDonald ordered Bell and Garcia to pick him up so that he could help them board the ABRAXIS. But when he noticed that one of the campers had remained at the boat ramp, he decided to investigate the camper. Accordingly, he ordered Bell and Garcia to stop and board the ABRAXIS without him. McDonald proceeded to the boat ramp, where he discovered the brown Ford and two of the rubber boats, each containing a quantity of marijuana residue. McDonald immediately notified Bell and Garcia of his discovery by radio.

At trial, McDonald insisted that he had discovered the marijuana residue prior to the boarding of the ABRAXIS. If his discovery of the marijuana preceded the boarding of the sailing vessel, then there is no question but that McDonald possessed sufficient knowledge to establish probable cause. Appellants concede this; nevertheless, they maintain that the boarding took place before the discovery of the marijuana residue. (Appellants' contention is bolstered by the fact that, at trial, neither Bell nor Garcia were able to confirm having heard McDonald's announcement of his discovery on the radio.) Appellants further contend that without the discovery of the marijuana residue by McDonald, the facts are insufficient to establish probable cause; therefore, argue appellants, the boarding took place without probable cause.

Whether McDonald discovered the marijuana residue before or after the boarding of the ABRAXIS took place is a factual question which we are unable to resolve on the basis of the record before us. However, we see no necessity for resolving this question, inasmuch as we find that McDonald had sufficient probable cause to stop and board the ABRAXIS prior to his discovery of the marijuana residue.

In our opinion, the above facts were sufficient to induce a reasonable person to believe that contraband was being transported in the ABRAXIS. Therefore, we find that Officer McDonald had sufficient probable cause to order Officers Bell and Garcia to stop and board the vessel for the purpose of conducting a search. *See United States* v. *Caraballo,* 571 F.2d 975, 977 (5th Cir. 1978) ("Probable cause exists if the 'facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been [or is being] committed. . . .' ") (quoting *Stacey* v. *Emery,* 97 U.S. 642, 645 (1878)). That the search was conducted without a warrant is justified by the exigent circumstances arising out of the mobility of the vessel. *United States* v. *Caraballo,* 571 F.2d at 977; *United States* v. *Cadena,* 585 F.2d 1252, 1263 (5th Cir. 1978); *see also Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971); *Carroll* v. *United States,* 267 U.S. 132 (1925).[5]

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[5] A finding that the boarding of the ABRAXIS was justified by the probable cause-exigency exception to the warrant requirement renders it unnecessary for us to explore alternative rationales which might support the boarding. This is not to say that such rationales do not exist.

II.

Several hours after the arrests of Ebert and Anglin at the boat landing, but before arriving at the Customs House, Customs Patrol Officer Puig conducted a second cursory search of the interior of the brown pickup truck. In the rear of the truck he found a green duffel bag containing some incriminatory charts and note pads. This evidence was subsequently introduced at trial over the objections of the appellants. Appellants maintain that the warrantless search of the duffel bag was unlawful; therefore, argue appellants, the court's refusal to suppress the contents of the bag amounts to reversible error.

Upon examining the record, we find that the contents of the green duffel bag were not considered by the court in determining the guilt or innocence of the appellants.[6] Therefore, the court's refusal to suppress that evidence, if error at all, was harmless.

For instance, in the proper case customs officers may be allowed to halt vessels sighted in intracoastal waterways for document checks and safety boarding. *See United States* v. *Whitmire,* 595 F.2d at 1315; *see also* 19 U.S.C. § 1541(a). The ABRAXIS' lack of running lights on a dark and rainy night may have justified such a boarding. In addition, the totality of the circumstances may have given rise to a "reasonable suspicion" of illegality which, under the Supreme Court's opinion in *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975), would justify a limited investigatory stop. Once on board, the presence of marijunana in plain view on the deck would have been adequate reason for further investigation.

[6] The following conversion took place between the court and the Assistant United States Attorney with respect to the contents of the green duffel bag:

> MR. LOFTON: In order not to give the Court any concern with reference to the other documents, the other documents we introduced, the maps and the charts, at this time we would withdraw those.
> THE COURT: Let the record show the Court has . . . never seen the exhibits which you now withdraw . . . .

III.

Appellants contend that the government failed to establish beyond a reasonable doubt that a conspiratorial agreement existed. They argue that some of their convictions were based solely on guilt by association.

We have stated that the gist or gravamen of the crime of conspiracy is an *agreement* to effectuate a criminal act. *United States* v. *Peterson,* 524 F.2d 167, 174 (4th Cir. 1975), *cert. denied,* 423 U.S. 1088 (1976). We also recognize that the existence of a conspiratorial agreement need not be proven by direct evidence, but may be inferred from the facts and circumstances of the case, i. e., circumstances indicating that two or more persons acted in concert to achieve an illegal goal. *Ianelli* v. *United States,* 420 U.S. 770 (1975); *Hamling* v. *United States,* 418 U.S. 87 (1974); *United States* v. *Godel,* 361 F.2d 21 (4th Cir.), *cert. denied,* 385 U.S. 838 (1966).

In *United States* v. *Alvarez,* 548 F.2d 542 (5th Cir. 1977), "the presence of seven men working under the cover of darkness on the banks of the Rio Grande to unload 1,600 pounds of marijuana which was floated across the river '[was] . . . sufficient to show a concert of action, all parties working together understandingly, with a single design. . . .'" *Id.* at 544 (quoting *United States* v. *Prout,* 526 F. 2d 380, 385 (5th Cir. 1976)). In the present case, the evidence establishes beyond a reasonable doubt that over two tons of marijuana were transferred from the sailing vessel ABRAXIS to vehicles waiting at the Buck Hall boat landing. Of necessity the facts and circumstances amply demonstrate the existence of a common plan or purpose shared by at least some of the nine appellants. Undoubtedly, there existed an unlawful agreement, or con-

spiracy, to possess and distribute a sizeable quantity of marijuana.[7]

Simply proving the existence of a conspiracy, however, cannot sustain a verdict against an individual defendant. There must also be a showing of that defendant's knowledge of the conspiracy's purpose and some action indicating his participation. *United States* v. *Falcone,* 311 U.S. 205, 210-11 (1940); *United States* v. *Prince,* 515 F.2d 564, 567 (5th Cir.), *cert. denied,* 423 U.S. 1032 (1975). These elements, knowledge and participation, may also be proven by circumstantial evidence. *Glasser* v. *United States,* 315 U.S. 60, 80 (1942); *United States* v. *Harris,* 409 F.2d 77, 83 (4th Cir.), *cert. denied sub nom. Brown* v. *United States,* 396 U.S. 965 (1969), and *Venning* v. *United States,* 396 U.S. 965 (1969).

Accordingly, we must review the evidence against each appellant and determine whether it is sufficient to sustain a conspiracy conviction. In doing so, we shall bear in mind that the evidence and all reasonable inferences arising from it must be viewed in the light most favorable to the government, the prevailing party. *Glasser* v. *United States,* 315 U.S. at 80; *United States* v. *Godel,* 361 F.2d at 23; *see Jackson* v. *Virginia,* —— U.S. ——, 99 S.Ct. 2781, 2789 (1979) (Our initial inquiry in determining whether, on review, the evidence was sufficient to support a criminal conviction is whether after "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

Appellants Niehaus, Marchant and Coffey were arrested aboard the sailing vessel ABRAXIS. A search of the vessel

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[7] The amount of marijuana involved (over two tons) sufficiently establishes that there was an intent to distribute. *See United States* v. *Villarreal,* 565 F.2d 932, 937 (5th Cir.) *cert. denied,* 439 U.S. 824 (1978).

and the Zodiac boats attached to it revealed marijuana residue. When first observed, at approximately 1:15 a.m., the ABRAXIS had been proceeding south on the intracoastal waterway. Although it was dark the vessel had no running lights. A lot of activity was observed in and around the sailboat. When another vessel appeared further south on the intracoastal waterway, the ABRAXIS turned and headed north. Several large Zodiac rubber boats, carrying what can be assumed to be large quantities of marijuana, moved from the ABRAXIS to the Buck Hall boat ramp, where the marijuana was loaded onto the campers waiting on shore. At the time of boarding Niehaus was at the helm. The obvious inference is that he was aware of the presence of the marijuana and that he was, in fact, actively participating in its delivery. The trial judge could reasonably have concluded that the presence of such a large quantity of marijuana on a sailboat the size of the ABRAXIS could hardly have escaped the attention of appellants Marchant and Coffey. Moreover, the hour, the place of apprehension, the lack of running lights and other furtive activity on and around the vessel all contribute to the inference that Marchant and Coffey shared in the enterprise. *See United States* v. *Whitmire,* 595 F.2d 1303, 1317 (5th Cir. 1979); *United States* v. *Weinrich,* 586 F.2d 481, 497-98 (5th Cir. 1978), *cert. denied sub nom. Blair* v. *United States,* 440 U.S. 982 (1979), and 441 U.S. 927 (1979).

Appellants Ebert, Anglin, Carr, Jester, Donnelly and Laughman can all be placed at or near the Buck Hall boat landing during the time in which the marijuana was deposited on shore and loaded onto the trucks. Their association had become evident earlier in the day when they were seen moving about and conversing with one another in rooms at a motel and in the motel parking lot.

Knowledge of and involvement in the conspiracy on the part of each individual appellant can be gleaned from the record.

Almost immediately after the delivery of the marijuana, Carr, Jester, Donnelly and Laughman left the area of the landing in three of the truck-campers. An inference may be made on the basis of the evidence that they had been present at the boat landing along with Ebert and Anglin. Throughout the evening customs officers, SLED and DEA agents maintained surveillance of the vehicles. When the campers entered the campground agents reported to Officer McDonald who, from his observation post, could see the headlights and forms of the campers as they congregated at the landing. Soon after the rubber boats were seen moving to shore, McDonald heard the campers start their engines and saw them depart the area of the boat landing. He reported to the agents stationed at the entrance who, in turn, followed the vehicles to the points at which they were stopped. At trial, the agents testified that upon leaving the campground, the orange and blue campers looked different, "weighted" or "sitting down in the back". Each of the campers was found to contain marijuana or other evidence of involvement in the enterprise.

Carr and Jester were apprehended in a truck-camper which contained over 1100 pounds of marijuana. There is an inference that the driver of the vehicle has knowledge of the contraband within it, certainly when the amount of contraband is so large. *See United States* v. *Hood,* 493 F.2d 677, 681 (9th Cir.), *cert. denied,* 419 U.S. 852 (1974). Thus, Carr's knowledge can be drawn from the fact that he drove and had control of the vehicle. While there is no such inference on the part of a passenger, "where there is a rational basis for attributing an interest in the contraband to the passenger because of his relationship to

the driver, his attitude, conduct or other probative circumstances, the trier of fact can infer sufficient knowledge to sustain a conviction. . . ." *Id.* Here, the circumstances certainly indicate that Jester was more than just a temporary passenger. His obvious comradery with the other appellants, the time of night, the surreptitious activity observed, and the large quantity of marijuana involved provide ample evidence to constitute a rational basis for attributing an interest in the marijuana to Jester. *See United States* v. *Gomez,* 529 F.2d 412, 419 (5th Cir. 1976).

Donnelly was observed to be in control of a camper containing over 3000 pounds of marijuana. Laughman was arrested while driving a pickup containing covers for the Zodiac boats which were used to carry the marijuana from the ABRAXIS to shore. Ebert was apprehended while in the cab or the brown camper located at the boat landing and found to contain marijuana residue and pieces of the Zodiac rubber boats. Anglin was arrested while standing at the head of the boat ramp and in close proximity to two Zodiacs, each containing marijuana residue. "Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the *connection is slight,* is sufficient to convict him with knowing participation in the conspiracy." *United States* v. *Dunn,* 564 F.2d 348, 357 (9th Cir. 1977). Here, the evidence establishes beyond a reasonable doubt that each of the appellants was connected in some way with a conspiracy to possess and distribute marijuana. Therefore, we find that their convictions on the conspiracy count should be affirmed.

IV.

Appellants argue that there is insufficient evidence to

sustain their convictions of possession with intent to distribute. As with the conspiracy charges, we must view the evidence and all reasonable inferences arising from it in the light most favorable to the government. *Glasser* v. *United States,* 315 U.S. at 80.

Once it is established that a defendant is a participant in a conspiracy to possess and distribute a controlled substance, he need not have actual possession of the controlled substance to be guilty of the substantive charge of possession with intent to distribute. Constructive possession is sufficient. *United States* v. *Gomez,* 529 F.2d 412, 419 (5th Cir. 1976); *United States* v. *Horton,* 488 F.2d 374, 381 (5th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974). Constructive possession exists when the defendant exercises, or has the power to exercise, dominion and control over the item. *United States* v. *Phillips,* 496 F.2d 1395, 1397 (5th Cir. 1974), *cert. denied,* 422 U.S. 1056 (1975). In addition, "[p]ossession need not be exclusive, but may be shared with others, and is susceptible of proof by circumstantial as well as direct evidence." *United States* v. *Mendoza,* 433 F.2d 891, 896 (5th Cir. 1970), *cert. denied,* 401 U.S. 943 (1971). In the present case, we agree with the trial judge that the evidence establishes beyond a reasonable doubt that all of the appellants were engaged in a concerted effort to transport and distribute over two tons of marijuana.[8]

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[8] The trial judge made the following finding:

> Just the general overall picture I think it would be incredible to believe in my opinion that anything but all of these Defendants were engaging in a concerted effort as partners in crime for violating the law and they were aiding and abetting each other and helping and participating in the activity and that they had in their possession, all of the Defendants, working together, that while all of them didn't have physical possession of the marijuana, that there was possessed by them together this marijuana and that they're guilty, all nine of them, as the Government has proved beyond a reasonable doubt, has proved that each of the Defendants, and I've considered each of the Defendants' cases, that they're guilty beyond a reasonable doubt as to both counts in the indictment based on the evidentiary ruling that I've made.

And while all of the appellants may not have had actual physical possession when they were apprehended, they each retained an interest in and dominion over the marijuana.[9]

Appellants Niehaus, Marchant and Coffey were apprehended while on the deck of a sailing vessel found to be carrying marijuana residue. The vessel had just completed a rendezvous at night with the other appellants. It is true that merely being a passenger in proximity to contraband is not enough to constitute constructive possession; *see e.g., United States* v. *Ferg,* 504 F.2d 914, 916-17 (5th Cir. 1974); however, "where other circumstantial evidence . . . is sufficiently probative, proximity to contraband coupled with inferred knowledge of its presence will support a finding of guilt on such charges." *United States* v. *Whitmire,* 595 F.2d 1303, 1316 (5th Cir. 1979). The presence of over 4000 pounds of marijuana could hardly have escaped the attention of anyone aboard the ABRAXIS. Other evidence, such as the hour, the place, the surreptitious activity observed, and the need for manpower sufficient to unload two tons of marijuana into three or four rubber boats without losing control of the sailboat in the wind and current of the intracoastal waterway all contribute to the inference that Niehaus, Marchant and Coffey shared in the undertaking. *Id.* at 1317. We find the evidence of their guilt sufficient.

Carr was arrested while operating a truck-camper which contained more than 1100 pounds of marijuana. Donnelly was found to have control of a camper which contained

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[9] We note that one who aids and abets in the commission of a federal offense may be convicted as a principal. 18 U.S.C. § 2; *United States* v. *Peterson,* 524 F.2d 167, 174 (4th Cir. 1975), *cert. denied,* 423 U.S. 1088 (1976).

over 300 pounds of marijuana. Under the circumstances, it seems inconceivable that they could have been acquitted of possession.

There was also ample evidence to constitute attributing an interest in the marijuana to both Jester and Laughman. *See United States* v. *Hood,* 493 F.2d 677, 681 (9th Cir.), *cert. denied,* 419 U.S. 852 (1974). Both were present at the Buck Hall boat landing when the marijuana was delivered. Jester was in the orange camper with Carr at the time of their arrests. An inference could properly be drawn that Jester, as well as Carr, was aware of the existence of the marijuana and that they were in joint possession. *Id.* Laughman was arrested while operating a camper which carried covers for the Zodiac boats. He was observed leaving the landing in tandem with the vehicle operated by Carr. "The large amount of marijuana supported a finding of a working relationship among several people which along with the setting, constituted sufficient evidence for constructive possession." *United States* v. *Gomez,* 529 F.2d at 419.

Ebert and Anglin's presence at the boat ramp during the time in which the marijuana was transported to shore, and the marijuana residue and Zodiac rubber boats found in their apparent possession, support a finding that they retained an interest in and constructive possession of the total quantity of marijuana. Under the circumstances, we find the evidence sufficient to convict each of the appellants of the substantive charge of possession with intent to distribute.

V.

Appellant Laughman contends that his conviction should be reversed because it was based solely upon perjured testimony. Apparently, the officers who arrested Laughman

testified that they found a deflated Zodiac rubber *boat* in the rear of the yellow camper driven by Laughman when, in fact, it was one or more *covers* for the Zodiac boats. There is no merit to Laughman's contention. The record clearly shows that when the trial judge made his finding of guilt, he was fully aware of the true nature of the evidence. The judge was convinced that the officers had simply made "an honest mistake." Clearly, Laughman's conviction was not based upon perjured testimony.

AFFIRMED

MOTION TO SUPPRESS

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CRIMINAL NUMBER 77-215

UNITED STATES OF AMERICA

v.

WALDEMAR G. EBERT, MITCHELL DALE ANGLIN, KENNETH DAVID JESTER, DANIEL N. DONNELLY, THOMAS E. NIEHAUS, LARRY KINE MICHAEL COFFEY, JAMES EDWARD MARCHANT, RONALD BRYCE LAUGHMAN, RICHARD STEVE CARR

MOTION TO SUPPRESS

TO: THE HONORABLE LIONEL LOFTON, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that upon the Annexed Affidavit, and upon this Motion, the Defendants, Waldemar G. Ebert, Mitchell Dale Anglin, Kenneth David Jester, Daniel N. Donnelly, Thomas E. Niehaus, Larry Kine Michael Coffey, James Edward Marchant, Ronald Bryce Laughman and Richard Steve Carr, will move the Court at a time and place named by the United States District Judge, for an Order to suppress any and all evidence gained by Federal or State agents by means of the search of:

A. A 1972 Chevrolet pickup truck bearing 1977 Ohio license number E5892;

B. A brown Ford pickup truck bearing Indiana license number 4099S-5;

C. An orange Chevrolet pickup truck bearing Ohio license number 5L8685;

D. A yellow Chevrolet pickup truck bearing Kentucky license number DFL140;

E. Room 140 of the Ramada Inn, 2934 Montagua Avenue, North Charleston, South Carolina;

F. Room 107 of the Knights Inn, 2355 Aviation Avenue, North Charleston, South Carolina;

G. Sailing vessel Abraxis.

Defendants will also move for an Order to suppress as evidence, any and all evidence gained by Federal or State agents by means of their search of the Defendants, Waldemar G. Ebert, Mitchell Dale Anglin, Kenneth David Jester, Daniel N. Donnelly, Thomas E. Niehaus, Larry Kine Michael Coffey, James Edward Marchant, Ronald Bryce Laughman and Richard Steve Carr, for the following reasons:

1. Some of the searches were made without a warrant and without authority;

2. The searches were not incident to a lawful arrest;

3. The searches were unreasonable.

By reason of the aforegoing, said searches and seizures were unreasonable in violation of the Fourth Amendment of the Constitution of the United States, and the Defendants were compelled to give evidence against themselves,

in violation of the self-incrimination laws of the Fifth Amendment of the Constiution of the United States.

/s/ ARTHUR G. HOWE
Attorney for the Deefndants, Larry Kine Michael Coffey, Thomas E. Niehaus and James Edward Marchant

/s/ BARRY KRELL
Attorney for the Defendants, Waldemar G. Ebert, Kenneth David Jester, Daniel N. Donnelly, Mitchell Dale Anglin, Ronald Bryce Laughman and Richard Steve Carr

At Charleston, South Carolina
This 21 day of Sept., 1977.

[CERTIFICATE OF SERVICE OMITTED]

RELEVANT PORTIONS OF THE TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

RULING OF THE COURT ON THE MOTION TO SUPPRESS

* * *

[255] THE COURT: What is your objection to the boarding of the Abraxis?

MR. OLDFIELD: There is no prabable cause, Your Honor. There was no communication between Agents McDonald, who was apparently running the land based operation, and I believe it's Agent Bell who was in charge of boarding, of the boarding of the vessel.

THE COURT: Now, they both testified there was communication between them.

MR. OLDFIELD: Yes, Your Honor, but Agent Bell testified he was told nothing more specifically than to board the vessel. He was not given any facts that supported the boarding of the vessel. I just believe the statute requires a showing of probable cause.

THE COURT: Of course, Mr. McDonald testified differently. But even for the sake of taking your position that McDonald prior to the time he gave the [256] order or at anytime thereafter, he says he gave it twice, but be that as it may, when he gave the order he knew about the marijuana. He had ample evidence before he evn found the marijuana residue. He'd seen the Zodiacs come in loaded and come out unloaded and he already had Bell to board it. And Bell's boarding was based on his order, that his knowledge or McDonald's knowledge is sufficient probable cause. Now, even just taking your position, accepting Bell's testimony over McDonald's, it appears to me the

same thing happened in the United States against Woods, 544 Federal 242, which is a Sixth Circuit case. And in that case the agents who did the arresting didn't base, didn't base the order, that they arrested not based on the order, although their superior at the time knew apparently sufficient facts for probable cause, however, they did base their arrests on no order from their superior. The Government tried to take the position in that case that the superior's knowledge of the officers is imputable to the inferior officer. And here's what the Court says, and it seems to be almost identical with the position you're [257] taking, that when a superior officer orders another officer to make an arrest, it is proper to consider the superior's knowledge in determining whether there was probable cause. Then they talk about a group. But they say here in contrast, because there was no eivdence, this is the superior officer, orders an arrest, because the basis of their arrest is on his knowledge and it can't be considered in determining probable cause. The Court makes a distinction when the superior officer has knowledge and the other officer who actually makes the arrest doesn't have knowledge. If the arrest is made on the order from the superior officer who does have probable cause to issue the order, that's sufficient; but if the superior officer has knowledge that the inferior officers don't have and the inferior officers don't make it as a result of the order of the superior officer, that is probable cause. You can't impute his probable cause just because they are officers.

MR. OLDFIELD: I would submit to the Court that you cannot impute the knowledge of the superior officers to the [258] inferior officers.

THE COURT: I agree with that. But the arrest was made directly on order of the boarding of the superior officer who did have probable cause.

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FINDINGS OF THE COURT

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[54] MR. OLDFIELD: The testimony is the one on the back of the yellow truck had substantial quantities of the water in it. It wasn't defined in terms of inches or gallons or anything else. I'm saying anybody that goes through a piece of plastic or rubber to determine it has substantial quantities of water in it certainly can tell the difference between one of those bags and one of those boats. They were not even close in size. It almost belies th imagination that it could be mistaken at that point. That adding to the different sizes of it, it becomes a little difficult to understand how after making the determination it had water in it that you wouldn't look at it close enough to determine it was bad.

THE COURT: No, Mr. Oldfield. Mr. Caldwell's testimony is one of the ones that I have no reason to think that he wasn't answering truthfully. He had a lot of I don't knows.

MR. OLDFIELD: He did, Your Honor.

[55] THE COURT: And I found that he would not perjure himself and I believe he was probably telling the truth. I believe he was, but what amazed me about it is maybe because I don't understand law enforcement and there is so much happening and was happening out there and such important things and then you ask him a question who got out where and how far the vehicle was back, I don't remember the questions, but he replied I don't know to five or six questions which amazed me; but I think he did it honestly. I thought maybe one or two weren't important, but I thought some of the questions he wasn't in position to answer were questions that I thought he should have been in a position to answer, let's

say that. But, again, I just think he made a mistake. I don't find that he made any effort to perjure himself. I don't believe that. And I just think he made a mistake. And the fact that he made a mistake, I wasn't surprised that he made a mistake in line with his general lackadaisical reply to so many of the questions. I found it would [56] be likely if anybody was going to make the mistake, he was going to be the one. I kind of look at the whole operation and I see some things that if I went back and if I had a copy of the testimony that I could point out Mr. Cooke rather amazing me the way that he works and they work; but as I said in retrospect when you're not there at the moment taking part in an ongoing surveillance and investigation, it's a lot easier to sit up here and criticize than it is if you're there. I tell you I found out from experience it's a lot easier to take a look at the record up in headquarters and find things that while we're down here we've got to make decisions down in this area and we do the best we can and it's a lot easier to look at them and say you should have done this or you should have done that. The more often that is done to me the more I can look back at those same people and say it's a lot easier and why did y'all do this and I found Mr. Caldwell's testimony that he thought it was a boat, that he saw a boat rather than bags and it had a lot of water in it, I found it [57] confirmed by his sort of lackadaisical testimony as to other questions that he should have known answers to. I don't think he perjured himself.

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TESTIMONY OF CUSTOMS PATROL OFFICER DANIEL McDONALD

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[20] Q. All right, sir. Approximately what time of night is this now?

A. This is from 10:30 till around midnight.

Q. All right, sir. And what happened around midnight?

A. Okay. Around midnight, in fact it was a little later than midnight, we heard an outboard motor on the Waterway.

Q. You say "we heard", who was with you?

A. Mr. Puig and Mr. Forte.

Q. All right, sir.

A. We were standing out on his property by the ICW. We heard this motor. We could not see anything; and from the sound of it, it sounded very close. We finally could see a little shadow on the water.

Q. All right, sir. [21] Stop right there, if you would. Mr. McDonald, tell us what the weather conditions were on this particular evening.

A. Okay. It had been drizzling on and off up through this time. It was overcast and very dark.

Q. Okay. So you heard the motorboat, heard a motor running. All right. And where was this is relation to Buckhall landing that you heard this motor?

A. Okay. Do you want me to stand up?

Q. Just point to it.

A. Okay. Again, this is Buckhall. Mr. Forte's property is right here. The sound and the boat were coming from the north proceeding south, and they proceeded by Mr. Forte's property and continued south in the Intracoastal Waterway.

Q. Were you ever able to observe anything in the boat or on the boat?

A. Yes. We could see two individuals and a mound of indistinguishable cargo that was stacked up on this rubber boat.

* * *

[23] Q. All right, sir. And what did you next observe?

A. Okay. Approximately 1:15 in the morning, we looked again to the north. We could see a sailing vessel coming down the ICW.

Q. All right, sir. Was there anything unusual about this sailing vessel?

A. Yes. It had no running lights on it. It was proceeding very, very quietly, I must say, down the water. When it got to a position in front of us, we knew again there were two of these Zodiac boats tied along side of it.

Q. Approximately what time of night is this or early morning?

A. This is one, 1:15 in the morning.

Q. In the morning of the twenty-seventh of July?

A. Yes.

Q. All right, sir. And how close were you to where this sailing boat was in the Intracoastal Waterway?

A. It passed us from about where I'm sitting [24] to the back wall.

Q. All right. Were you able to observe anything other than the Zodiac type boats attached along side?

A. We could see activity on the deck, people moving about. But there were only shadows because of the darkness that night.

Q. Were you able to determine how many people were on board that night?

A. No.

Q. What did you observe this boat do?

A. It proceeded approximately a hundred fifty yards south of where we were standing and it appeared to have dropped anchor. And we could hear — we heard one Zodiac boat come by us originally and go south. But this, too, came from the south, back up to this sailing boat.

Q. Okay.

A. Again, they — they were like bees around the sailing boat. They went around it, tied up to it and then we noticed a large spotlight to the south, like you would see when [25] a barge or a tugboat is coming up the water. And this apparently had something to do with the decision of the people in the sailboat to turn tround and head back north. The rubber boats all broke away from the sailing vessel and turned to the north. They came by us. They all had large mounds of indistinguishable cargo. One Zodiac was even pulling another Zodiac that I don't believe had a motor on it; and it, too, had this large mound of cargo.

Q. How many Zodiacs in all were you able to observe heading north at this time?

A. Three.

Q. And the sailing vessel also turned and headed north?

A. Yes.

* * *

[28] Q. Okay. What did you yourself next do?

A. Okay. I instructed our boat, which had been coming north on the ICW, to continue north to the sailing vessel and board it.

Q. All right, sir. And you say your boat, what type of boat does Customs have? What were you using that night?

A. Well, it was a DEA boat. It is a [29] twenty-four foot Stingray.

Q. Who was aboard that boat?

A. Mr. Dasbit (phonetic spelling), Mr. Bell and Mr. Garcia.

Q. So you advised them to board the boat, board the vessel?

A. Yes, sir.

Q. All right, sir. What happened? What did you yourself do next?

A. Okay. I had told the boat to pick Mr. Puig and myself up at Mr. Forte's property because we didn't know how many people were on board the sailing vessel. And what I had in mind, in my mind was going on, I was afraid that one boat handler and two people to board a sailing vessel was not enough. However, approximately at the same time I noticed there was one truck left down at the boat ramp. Its lights came on. So I said we're going to have to go down and see what is in the boat ramp. Mr. Puig and myself got in the truck and Mr. Forte went down with us. We drove down to the boat ramp. The brown Ford truck which had been pulling the boat was at the boat ramp as we approached the boat ramp and the [30] truck pulled away from the boat ramp into a parking spot; and as we turned and came up towards the boat ramp, I could see one individual standing and just looking at us. And there was one individual in the truck.

Q. Okay, sir. What did you observe at the boat ramp?

A. We got out and made ourselves known. Mr. Puig

and Mr. Forte stayed with the two individuals who were present. I went down and looked in the rubber boats which were pulled up on the boat ramp.

Q. How many boats were there?

A. Two.

Q. These were your Zodiac type boats?

A. Yes. And I could observe a large amount of what appeared to be marijuana residue on the boats and on the concrete.

* * *

[67] A. With some difficulty we managed to put them in the back of the pickup truck we were driving.

Q. Whose pickup truck was that?

A. It belonged to the United States Customs.

Q. Have you been driving that truck that day?

A. Yes, sir.

Q. No doubt in your mind that the two Zodiacs were placed and secured in your truck, am I correct?

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TESTIMONY OF SOUTH CAROLINA LAW ENFORCEMENT DIVISION AGENT DEAN POWELL

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* * *

[35] Q. All right, Now, who said that to you?

A. Special Agent Caldwell.

Q. Special Agent Caldwell?

A. Yes, sir.

Q. He said he had a rubber raft?

A. And an outboard motor and some tools. When I looked in the back that was in there. I looked in the back of the truck and that was what was back there.

Q. You saw that, also?
A. Yes.
Q. Did you take a picture of the back of the truck of what you perceived in either truck at that time?
A. No, sir.
Q. Did you still have your camera with you?
A. Yes. My light meter wouldn't even move * * *

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TESTIMONY OF CUSTOMS PATROL OFFICER FRANK R. GARCIA

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[87] Q. Directing your attention, Mr. Garcia, to the evening of the twenty-sixth of July and the morning of the twenty-seventh, I ask you where you were on those particular dates?

A. Yes. I was at that time working on the case of the Abraxis around the Buckhall area.

Q. And what were your duties, sir?

A. At that time I was on a patrol automobile and then on a boat.

Q. What type of boat were you on?

A. I was on a Searay boat, Customs assigned boat.

Q. Who was on that boat with you?

A. It was Officer Daspith and Officer Bell.

Q. All right, sir. And did your boat subsequently stop and board a vessel that evening or early morning?

A. Yes, sir, early morning.

Q. All right, sir. [88] And where did this boarding take place?

A. It took place in the Buckhall area, about a half a mile north of the landing.

Q. All right, sir. And what if anything did you do upon boarding the vessel? First of all, why did you board the vessel?

A. We had this vessel under surveillance and I was instructed by the supervisor that they were unloading at the area and we boarded.

Q. Now, you were instructed by your supervisor to board; who was your supervisor?

A. At that time Supervisor McDonald.

Q. David McDonald?

A. Yes, sir.

Q. How did he instruct you to board the vessel?

A. I was in radio communication with him. I had a radio with me.

Q. Who operated the radio on this twenty-one foot Searay?

A. I had the radio.

Q. All right, sir. And what if anything did McDonald tell you prior [89] to boarding the boat?

A. Of course, it was bad radio communication; but I could hear that the big boat was unloading on shore and that was, you know, the communication.

Q. So you boarded the boat per his instructions?

A. Right.

* * *

[95] Q. Would it be a fair statement that at the time you personally boarded the Abraxis that you had not immediately before then seen anybody loading or unloading anything from the Abraxis?

A. Myself, I did not, no, sir.

Q. You didn't see anything going on between anybody

either on the waterway, on rafts or anybody on land having anything to do with the Abraxis at the moment that you boarded it?

A. At that moment that I boarded, no, sir.

[96] Q. Nor for any period of time prior to the time that you boarded it, isn't that a fact?

A. I don't quite follow you, sir. I don't understand.

Q. When your boat approached the Abraxis —

A. Yes, sir.

Q. There were no rafts in the water, were there, with people in them?

A. I didn't see any boats, no drivers.

Q. That's what I'm driving at. Thank you.

* * *

[98] Q. So prior to boarding this boat you three men who were in the Searay boat, that's yourself and Bell, Mr. Daspith and Bell?

A. Yes.

[99] Q. The three of you had no firsthand knowledge of the contents of the boat, isn't that correct?

A. Except, well, the radio conversation I was listening to and the radio was going on up above.

Q. And did you in preparation of this case read over any of the reports that other agents have written up about this?

A. I have seen some of them.

Q. Mr. McDonald and Mr. Cooke, they used the term repeatedly in those reports if you'll recall indistinguishable cargo, do you recall reading that term?

A. Yes.

Q. So the reports from up above in effect were saying that they were observing mounds of indistinguishable cargo, isn't that what they were saying?

A. I don't know. It could be.

Q. And the only advice that y'all could get was over a Customs radio?

A. That's correct, yes, sir.

* * *

[104] Q. These boys lived on this boat, right? It was very apparent from your inspection that they lived there, they had their clothing and gear and so forth on there?

A. They had clothing and gear on board, yes, sir.

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TESTIMONY OF CUSTOMS PATROL OFFICER MICHAEL BELL

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[112] Q. The last two that are listed there are the two Avon-type that you've just been discussing with Counsel?

A. Yes.

Q. The two that you got the serial numbers from?

A. Yes.

Q. And those were the two that were tied behind the Abraxis sailboat?

A. Yes.

* * *

[215] A. We were heading north on the ICW and we spotted a white sailboat, Columbia type, headed south on the ICW. We passed it inadvertently. We ran upon it too quickly.

Q. Why did you run upon it too quickly?

A. It was very dark.

Q. Were you running with the lights?

A. No, we weren't.

Q. Was it running with lights?
A. No, it wasn't.
Q. So you ran past it?
A. We went past it. Mr. McDonald observed our activity and asked us to keep going north as if nothing was wrong. So we headed up past what is called the Governor's Dock. We waited there.
Q. All right, sir. What time was this, approximately, do you know?
A. Shortly before three.
Q. What next happened?
A. He told us to come back and pick him [216] up at Buckhall, that him and Mr. Puig would like to get on our boat and help us in the boarding of that vessel.
Q. All right, sir. Did you return to the Buckhall area?
A. Yes, we did.
Q. Did you in fact pick up Mr. McDonald?
A. No. He informed us to disregard those instructions, to go ahead and proceed with the boarding with the people we had aboard.
Q. What next happened?
A. We pulled up alongside the vessel. We hit them with a spotlight. I informed them that we were U.S. Customs and I was coming aboard and we attempted to tie up to the vessel, but our vessel was having engine problems and I was able to get aboard anyhow. From that point I proceeded back to the stern of the vessel where the subject Mr. Niehaus was at the helm.

* * *

[218] Q. Agent Bell, when you first got in this boat and proceeded up the ICW, when was the first time you saw the sailboat, approximate time?
A. Approximately three o'clock.
Q. Okay. Three a.m. that would be?

A. Yes.
Q. That's when you inadvertently went past it?
A. Yes.
Q. You said during this time you were basically maintaining radio silence, is that correct?
A. We were transmitting only when necessary.
Q. And originally [219] you got a broadcast from Mr. McDonald, Customs Patrol Officer McDonald to come back to Buckhall to pick him up, is that right?
A. That's right.
Q. And then you got a transmission from Mr. McDonald to ignore that, don't come back and pick him up?
A. That's right.
Q. He then instructed you to go aboard the vessel?
A. That's right.
Q. Did you receive any other communications from Mr. McDonald?
A. No.
Q. None whatsoever?
A. (The Witness shakes his head.)
THE COURT: Speak out, Mr. Bell, she's got to take it down.
THE WITNESS: All right.
Q. No other communications from Mr. McDonald?
A. No.
Q. From any other person?
[220] A. No.
Q. And so the only information, you know, that you had, you had no information coming from onshore, you weren't giving them information at this time?
A. No.

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TESTIMONY OF SOUTH CAROLINA LAW ENFORCEMENT DIVISION OFFICER JAMES C. CALDWELL

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* * *

[179] Q. All right, sir. What did you next do?

A. I went and set myself up again north.

Q. On 17?

A. On 17. And I didn't do anything specifically that I can remember off the top of my head until later on we got some notification that some more of the vehicles were leaving out; and I got a surveillance of the yellow 1977 Chevrolet pickup.

Q. This is the same truck you observed earlier?

A. Yes, sir.

[180] Q. Where did you pick up that surveillance?

A. Coming out of Buckhall. It came out of Buckhall. I picked him up on this surveillance driving very, very slow.

Q. Where did he go?

A. He headed up 17. There was another vehicle pulled up behind him, so that meant between us there was another pickup vehicle which had pulled out. I believe it was an orange Chevrolet. I don't know the particular model. Maybe a '74. I continued following it. Now, during all this time, a lot of things had occurred. The boat had been stopped. There had been some people already arrested. All this transmission was coming over the radio.

Q. Did you know they had found marijuana?

A. Yes, sir. Marijuana residue was definitely stated having clearly been on the boat and on the boat landing.

Q. Was anyone else in this surveillance convoy with you?

A. Yes, sir. Special Agent Powell and [181] Officer Williams with the CPO was in another car behind the orange pickup truck. And we continued on into Mount Pleasant and we also heard Agent Cooke state to us that it appeared the blue pickup truck was loaded as much as it could be loaded. It could hardly make it across the Cooper River Bridge. But they were again a good bit ahead of us; so we continued and remember I'm in a car by myself; and Agent Powell and Albert Williams were together. We continued on towards Mount Pleasant trying to find a good lighted area due to just safety reasons before we stopped the vehicles. We had done the notification of finding the marijuana residue aboard the boat and at the boat landing; so we had also asked for some assistance. I notified the Highway Patrol for a patrolman, if possible, again for safety reasons. And we came to a real good lighted area across from the shopping center just coming in from 17.

Q. That's on the by-pass in Mount Pleasant?

A. Yes, sir, approximately a mile and a half, two miles from the foot of the Cooper [182] River Birdge. By this time Acting Agent in charge of the CPO, Ostrowsky, I believe that's the best I can pronounce it, he was coming south — correction, coming north. By this time he had entered the convoy with us and we pulled him over. I pulled in front of the yellow Chevrolet pickup. Mr. Ostrowsky I believe pulled in between. I'm not absolutely sure of the coordination of who was in front of who. I think Agent Powell and Al Williams was behind the orange pickup truck.

Q. How did you pull them over?

A. Blue lights.

Q. What happened next?

A. I asked the driver if he wouldn't mind stepping out

of his vehicle. I identified myself. I didn't have a uniform, so I had to show him a badge and credentials to identify myself to him; and CPO Ostrowsky was coming in his car and I asked him would he mind stepping to the rear of the vehicle to keep him in front of the headlights; so we stepped to the rear of the vehicle; and during this [183] time, CPO Ostrowsky was looking inside. He had opened the door to the back of the camper and, you know, it had a Zodiac Avon type rubber raft in it, some camping equipment. I didn't take a giant look. There was a bunch of marijuana residue, a tremendous amount of water and I placed the Defendant under arrest.

Q. Where was the marijuana residue?

A. There was a lot of it inside the boat, inside the rubber raft in the back of the camper.

Q. Who was this particular individual you placed under arrest?

A. I can pick him out, but I hate to use the name because I found out names ain't very good in these cases.

Q. Ask him to stand if you show him to us.

A. Be glad to. The gentleman on the second row with the dark suit. Stand up. With the glasses. Yes, sir, you.

Q. Mr. Laughman?

A. Yes, sir, that's the gentleman.

[184] Q. That's the gentleman in the yellow pickup?

A. As I recall. I don't believe he had his ID with him.

Q. Okay. What if anything did you next do?

A. I placed him under arrest and he was taken away by some other agent.

MR. LOFTON: All right, sir.

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TESTIMONY OF DEA AGENT LUTHER COOKE

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[248] Q. And you are not certain which agent compiled that inventory, but it did come to you in the official line of work as one of your business records, did it not?

A. Yes, sir. This was the inventory furnished to the D.E.A. to the U.S. Customs Service after their inventory of vehicle number 4, the yellow Chevrolet truck with Kentucky tags on it.

Q. While it is difficult to read by copy and I know it is, of course, there is no question, is there, that there was not found in the back of the yellow truck indicated by this inventory a Zodiac or any type of life raft, isn't that correct?

A. The closest thing to it is one Zodiac bag with four oars located about halfway down the patch. There is no other notation of Zodiac anywhere on the inventory.

Q. Now, could you, just for the record, describe the size of the Zodiacs that were seized in this case?

A. I believe the Zodiacs that were seized in this case were between twelve and fourteen feet long, but it's when they're inflated. Deflated —

[249] Q. How wide are they?

A. Wide, I believe they are probably six to seven feet wide.

Q. And how high are they if they were measured from the ground up?

A. Roughly a foot, foot and a half.

Q. Now, you were in the back end of this yellow camper; could you give me the dimensions or size based on your recollection of the interior of that truck?

A. Interior of the yellow camper would be roughly

five feet wide. The overhead portion probably as much as ten feet long and the bed of the truck itself six to eight feet.

Q. So based on those dimensions and your observation of the Zodiacs in question, it would have been virtually impossible, would it not, to have an inflated Zodiac on the inside of that camper, an inflated one?

A. Yes, sir.

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